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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OIL COMPANY,

Petitioner,

v.

BARKAT U. KHAN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION IN SUPPORT OF THE RESPONDENTS

WILLIAM A. NEWMAN
JAMES A. MOORS
WM. BRETT RICHARDSON
National Automobile Dealers Association
8400 Westpark Drive
McLean, VA 22102
(703) 821-7041

PAUL R. NORMAN
(Counsel of Record)
JAMES E. BARTZEN
JENNIFER S. MIRUS
Boardman, Suhr, Curry & Field
410 Firstar Plaza
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701-0927
(608) 257-9521

Attorneys for Amicus Curiae

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTIONS PRESENTED

This brief addresses only the second question presented in the petition for a writ of certiorari:

Whether vertical maximum price fixing agreements should continue to be *per se* illegal under §1 of the Sherman Act, 15 U.S.C. 1?

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INTEREST OF THE AMICUS CURIAE

The National Automobile Dealers Association ("NADA") is a nonprofit national trade association of franchised motor vehicle dealers. Its approximately 19,500 members are located in all 50 of the United States. NADA frequently represents its members before this Court and other tribunals on issues affecting the retail motor vehicle trade, including issues concerning the relationships between motor vehicle manufacturers, dealers and retail buyers. Pursuant to Sup. Ct. R. 37, consents of all parties to the filing of this brief have been filed with the Clerk of Court.

NADA members participate in an industry that is characterized by intense intrabrand and interbrand competition. Such competition is not based solely on price. It also is based on serv ce, including such factors as new vehicle inventories, demonstrators, sales information, quality and training of sales personnel, dealer-installed accessories, and convenience and quality of after market service for the vehicle. In order to compete for new vehicle sales, a dealer must offer more than a competitive price. Today's retail motor vehicle buyer demands a high level of service from the dealer both during and after the sale.

Different buyers place different values on price and various service factors. Some buyers are willing to pay little for service and want only the lowest price available. Other buyers are willing to pay more to ensure a high quality of service.

Vertical maximum price fixing agreements between motor vehicle manufacturers and their dealers threaten service competition among the dealers. Such agreements

have the potential of limiting the range of choices that buyers will have regarding combinations of price and service factors. They place decision-making regarding the combinations of price and service factors that can be offered in the hands of the manufacturer and diminish the ability of an individual buyer and dealer to decide upon the most desirable combination for that buyer.

Vertical maximum price fixing agreements also invite collusion among dealers to lobby the manufacturer to maintain the price ceiling at an artificially high level. They also risk creating a uniform price at the price ceiling in an industry that traditionally has been characterized by intense price competition.

The anticompetitive risks of vertical maximum price fixing agreements in the motor vehicle industry are not justified by a need to control the exploitation of market power by retail dealers. NADA agrees with the American Automobile Manufacturers Association ("AAMA") and the Association of International Automobile Manufacturers ("AIAM") when they state in their *amici curiae* brief that there is "intense interbrand competition" in the motor vehicle industry. (AAMA and AIAM Brief, at 2). This is evidenced by the fact that there are 21 different manufacturers, some of whom offer more than one make of vehicle, who are members of AAMA or AIAM. Competition at the retail level of the motor vehicle industry is even more intense because, in addition to many interbrand competitors, there is intrabrand competition among dealers of the same make in most relevant markets.

Because of the intense interbrand and intrabrand retail competition in the motor vehicle industry, very few, if any, dealers possess the market power necessary to charge prices higher than those that would be set in a competitive market. The interest of AAMA and AIAM in advocating overturning the long-established *per se* rule against vertical maximum price fixing agreements is not in the prevention of market power exploitation by their members' dealers. Instead, the manufacturers' interest is in allowing themselves to substitute their own judgment for the workings of the marketplace in determining the retail price for motor vehicles. However, manufacturer interference with the competitive process by setting retail price ceilings for motor vehicles continues to pose the same economic risks as have been found previously by the Court in holding maximum price fixing to be *per se* illegal under §1 of the Sherman Act.

NADA members do not want the Court to abandon the *per se* rule against all forms of "naked" price fixing agreements which has served their industry well. They are not convinced that their manufacturers are "smarter" than the marketplace when it comes to determining the appropriate combination of price and service that will attract buyers to their products. Manufacturers are controlled by humans who, while educated and well-meaning, are hardly infallible when it comes to understanding what the public wants. All members of the motor vehicle industry, and the consumer, will be best served if manufacturers remain constrained by the *per se* rule from interfering with market forces by imposing maximum price fixing agreements on their dealers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Almost from the inception of the Sherman Act, the Court has found virtually every form of price fixing agreement to be a *per se* violation of §1 of the Act. The only exceptions have been for price fixing agreements that are ancillary to some procompetitive venture that could not function without the agreement. *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 22 (1979). "Naked" price fixing agreements have always been considered so potentially anticompetitive as to justify *per se* treatment.

After over 40 years of experience with price fixing agreements, the Court in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-22 (1940) stated that "[a]ny combination which tampers with price structures is engaged in an unlawful activity," whether the combination "raised, lowered, or stabilized prices," and that if a change in the *per se* rule of illegality with regard to price fixing agreements was to be made "it must be done by the Congress." Since *Socony-Vacuum*, Congress has not acted to eliminate or modify the *per se* rule against all forms of "naked" price fixing agreements, and the Court has continued to apply the *per se* rule to such agreements, including those that only fix maximum prices. The Court has determined that both horizontal and vertical maximum price fixing agreements pose the real risk of anticompetitive injury including interference with the market's ability to decide the price that customers are willing to pay for service in connection with the products they purchase, discouraging innovation, the movement from maximum to uniform prices and the facilitation of cartels at both manufacturer and retailer

levels. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982); *Albrecht v. The Herald Co.*, 390 U.S. 145, 152-53 (1968).

Even if the Court is prepared to retreat now from its position in *Socony-Vacuum* that any change to the *per se* rule against any combination that tampers with price must be done, if at all, by Congress, the Court should not "lightly assume that the economic realities underlying" its decisions regarding the anticompetitive potential of maximum price fixing in *Maricopa* and *Albrecht* "have changed, or that earlier judicial perceptions of those realities were in error." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 732 (1988). Any departure from the long-established *per se* rule against "naked" price fixing agreements, including vertical agreements that fix maximum prices, should require clear proof that the economic assumptions that gave rise to the rule in the first place were erroneous and that modification of the rule is required to avoid harm to competition.

Such proof does not exist. The potential anticompetitive harm of maximum price fixing agreements is as real today as it was when *Albrecht* and *Maricopa* were decided. The procompetitive arguments advanced by advocates for a modification of the *per se* rule with regard to vertical maximum price fixing agreements are without factual support. The only procompetitive argument in favor of vertical maximum price fixing agreements is the avoidance of market power exploitation by retailers. However, as the Court has recognized, "[r]etail market power is rare, because of the usual presence of interbrand competition and other dealers, . . ., and it should therefore not be assumed but rather must be proved."

Business Electronics Corp., 485 U.S. at 727, n.2 (citing *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54 (1977)). Given the absence of any real procompetitive justification for vertical maximum price fixing agreements, and their real potential for anticompetitive harm through artificial interference with the competitive marketplace, such agreements should continue to be governed by the *per se* rule of illegality.

ARGUMENT

I.

ALL FORMS OF "NAKED" PRICE FIXING AGREEMENTS HAVE ALWAYS BEEN ADJUDGED *PER SE* ILLEGAL UNDER §1 OF THE SHERMAN ACT

The *per se* rule against price fixing agreements was adopted by the Court in the first price fixing case arising under the Sherman Act. In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), "the Court was required to pass on the sufficiency of the defendants' plea that they had established rates that were actually beneficial to consumers. Assuming the factual validity of the plea, the Court rejected the defense as a matter of law." *Maricopa*, 457 U.S. at 350, n.22.

Forty-three years later in *Socony-Vacuum*, the Court observed:

> [F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

. . . .

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price fixing schemes are wise or unwise, healthy or destructive. . . . If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice.

. . . .

> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

Socony-Vacuum, 310 U.S. at 218, 221, 222, 223.

Neither Congress nor the Court has seen fit to change the broad application of the *per se* rule to all forms of "naked" price fixing agreements since *Socony-Vacuum*.

The *per se* rule against price fixing agreements has been applied as consistently to vertical price fixing agreements as it has been to horizontal agreements. In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), the Court found in the first vertical price fixing case presented to it that the practice was a violation of the Sherman Act, notwithstanding the supplier's

assertions regarding "the importance of a standard retail price" and allegations "that confusion and damage have resulted from sales at less than the prices fixed." *Id.* at 407. In doing so, the Court noted that vertical price fixing agreements affecting all of a supplier's dealers have the same effects as horizontal price fixing agreements among the dealers themselves which "are injurious to the public interest and void." *Id.* at 408. "[T]he complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other." *Id.*

The *per se* rule against both vertical and horizontal price fixing has also been consistently extended to maximum, as well as to minimum, price fixing agreements. The Court has adhered to the principle enunciated in *Socony-Vacuum* that a combination that tampers with price should be condemned *per se* whether or not the members of the combination have market power and whether the combination "raised, lowered, or stabilized prices." *Socony-Vacuum*, 310 U.S. at 218. In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951), a case involving elements of both horizontal and vertical price fixing, the Court held that an agreement among competitors to fix maximum resale prices of their products was a *per se* violation of the Sherman Act because "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." The *per se* rule against maximum price fixing subsequently has been applied by the Court to both pure vertical maximum price fixing agreements, *see Albrecht*,

390 U.S. at 149, and pure horizontal maximum price fixing agreements, *see Maricopa*, 457 U.S. at 342.

In applying the *per se* rule to maximum price fixing agreements, the Court has not, as some have suggested, engaged in "formalistic line drawing" but has instead considered the "demonstrable economic effect" of such agreements as is appropriate in categorizing a practice as *per se* illegal. *Business Electronics Corp.*, 485 U.S. at 724 (quoted sources omitted). In both *Albrecht* and *Maricopa*, the Court gave sound economic reasons for not carving out an exception from the *per se* rule for maximum price fixing agreements. *Albrecht*, 390 U.S. at 152-53; *Maricopa*, 457 U.S. at 332. These economic reasons will be discussed in more detail below.

Even the dissent in *Maricopa* did not urge repeal of the *per se* rule against "naked" maximum price fixing agreements. It instead felt that the agreement in that particular case should have been given consideration under the Court's single exception from the *per se* rule for price fixing agreements established under *Broadcast Music*, 441 U.S. 1, which requires that "[b]efore characterizing an arrangement as a per se price fixing agreement meriting condemnation, a court should determine whether it is a "'naked restrain[t] of trade with no purpose except stifling of competition'" or "whether the procompetitive economies that the arrangement purportedly makes possible are substantial and realizable in the absence of such an agreement." *Maricopa*, 457 U.S. at 361-62 (Powell, J., dissenting). Thus, the Court was unanimous in *Maricopa* that maximum price fixing is *per se* illegal unless necessary to the achievement of procompetitive benefits "that otherwise are not attainable." *Id.* at 364

(Powell, J., dissenting). The maximum price fixing agreement at issue in this case has not been shown to belong to this category and, therefore, does not justify departure from the application of the *per se* rule.

The Court has not suggested since *Albrecht* and *Maricopa* that either of those cases were wrongly decided. The principle that vertical price fixing agreements are *per se* violations of §1 of the Sherman Act has been assumed since then on several occasions. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341 (1987); *Business Electronics Corp.*, 485 U.S. at 724; *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). Because the application of the *per se* rule to both vertical and horizontal price fixing agreements is firmly established, the Court's decisions regarding vertical price fixing since *Albrecht* have dealt with the issues of when or under what circumstances an illegal vertical price fixing agreement is formed, *Monsanto, supra*, and *Business Electronics Corp., supra*, and whether a competitor of the members of a vertical maximum price fixing arrangement can show "antitrust injury" for purposes of collecting treble damages under §4 of the Clayton Act, 15 U.S.C. §15. *Atlantic Richfield, supra*. The *per se* rule of illegality for "naked" price fixing agreements of all forms, once they are shown to exist, remains a cardinal principle of the Court's antitrust jurisprudence.

II.

THE LONG-ESTABLISHED *PER SE* RULE AGAINST "NAKED" PRICE FIXING AGREEMENTS SHOULD BE MODIFIED ONLY BY CONGRESS OR, AT THE VERY LEAST, ONLY ON A CLEAR SHOWING OF ERROR IN THE ECONOMIC ASSUMPTIONS THAT UNDERLIE THAT RULE

A. The Court Has Previously Held That Any Change In The Per Se Rule Against All Forms Of "Naked" Price Fixing Agreements Should Be Done By Congress.

In *Socony-Vacuum*, the Court stated:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. *Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. . . . If such a shift is to be made, it must be done by the Congress.* Certainly Congress has not left us with any such choice.

Socony-Vacuum, 310 U.S. at 221-22 (emphasis supplied).

Because Congress has not seen fit to change the *per se* rule of illegality for any form of "naked" price fixing agreement since *Socony-Vacuum* was decided, the Court cannot now change the rule itself without violating its own proscription.

B. Even If Congress Does Not Have To Act To Change The Per Se Rule Against All Forms Of "Naked" Price Fixing Agreements, The Rule Should Not Be Modified Unless It Is Clear That The Economic Realities Underlying The Rule Have Changed Or That Earlier Judicial Perceptions Of Those Realities Were In Error.

In *Business Electronics Corp.*, the Court observed that "the common law, both in general and as embodied in the Sherman Act, does not lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error." *Id.* at 732. Accordingly, the Court should not depart from the long-established *per se* rule of illegality for all forms of "naked" price fixing agreements without clear proof that the economic assumptions on which the rule was established are no longer credible. Such proof is not present, as shown in the next section of this brief.

III.

THE ECONOMIC JUSTIFICATION FOR THE *PER SE* RULE AGAINST ALL "NAKED" PRICE FIXING AGREEMENTS, INCLUDING VERTICAL MAXIMUM PRICE FIXING AGREEMENTS, REMAINS SOUND

A. There Are No Perceivable Economic Differences Between The Effects Of Horizontal And Vertical Maximum Price Fixing Agreements.

Abolishing the *per se* rule of illegality for vertical maximum price fixing agreements would, at the very least, bring into question the *per se* rule against horizontal maximum price fixing agreements adopted by the Court in *Kiefer-Stewart*, *supra*, and *Maricopa*, *supra*. The economic reasons for applying the *per se* rule to horizontal

maximum price fixing agreements parallel those used by the Court to apply the same rule to vertical maximum price fixing agreements. There is no economic argument for applying the *per se* rule to one and not to the other type of maximum price fixing agreement.

In *Maricopa*, the Court stated that a horizontal maximum price fixing agreement violated the *per se* rule because it "tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases," "discourage[s] entry into the market and may deter experimentation and new developments by individual entrepreneurs" and "may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character." *Maricopa*, 457 U.S. at 348.

In *Albrecht*, the Court gave the following reasons for making vertical maximum price fixing agreements *per se* illegal.

> [S]chemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. . . . Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the

> fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices.

Albrecht, 390 U.S. at 152-53.

A comparison of the economic considerations given in *Maricopa* and *Albrecht* shows that the *per se* rule against maximum price fixing agreements has the same economic underpinnings with regard to both horizontal and vertical agreements. In summary, these economic underpinnings include: to ensure that market forces will decide the price that customers are willing to pay for product quality and services in connection with the product; to prevent the discouragement of innovation; to prevent potential uniform price setting when prices coalesce at the established maximum price; and to prevent facilitating cartels at either the manufacturer or retailer level.

The Court has observed that the "notion of equivalence between the scope of horizontal per se illegality and that of vertical per se illegality was explicitly rejected in *GTE Sylvania*, *see*, 433 U.S. at 57, n.27, . . ., as it had to be, since a horizontal agreement to divide territories is per se illegal, . . ., while *GTE Sylvania* held that a vertical agreement to do so is not." *Business Electronics Corp.*, 485 U.S. at 734. However, vertical territorial agreements were demonstrated in *GTE Sylvania* to have clear benefits to interbrand competition where, as shown below, vertical maximum price fixing agreements do not. Therefore, it would be very difficult for the Court to abolish the *per se* rule of illegality for vertical maximum price fixing agreements without also doing the same for horizontal maximum price fixing agreements, just as its holding that a competitor of vertical maximum price fixing arrangement does not have "antitrust injury" is equally applicable to competitors of a horizontal maximum price fixing arrangement.[1] *See*, *Atlantic Richfield*, 495 U.S. at 346 (Stevens, J., dissenting). To do so with regard to either type of an agreement would be a serious blow to the antitrust principles that have preserved competition based on innovation, service and other nonprice factors without artificial restrictions on the prices needed to cover the costs of such competition.

NADA does not intend to address all of the potential anticompetitive harms of vertical maximum price fixing agreements. Only the issues relating to injury to service competition, encouragement of horizontal collusion, potential harm to interbrand competition and potential for uniform price setting will be addressed in this brief.

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[1] Although NADA does not address the issue of "antitrust injury" in this brief, it does note that there is a substantial difference between the injury suffered, as a result of a vertical maximum price fixing agreement, by a competitor of the retailers who are parties to that agreement and the injury suffered as a result of that agreement by the retailers themselves or their customers. As the Court noted in *Atlantic Richfield*, the only injury suffered by the competitor may be the inability to charge higher prices. However, the retailers and their customers may be injured by the weakening of the retailers' abilities to engage in effective service and interbrand competition because the maximum price has been set too low. *Cf. Atlantic Richfield*, 495 U.S. at 345 (1990) ("A competitor will not bring suit to protect the dealer against a maximum price that is set too low, inasmuch as the competitor would benefit from such a situation.").

B. The Interference With Market Forces Caused By Vertical Maximum Price Fixing Agreements Is Harmful To Consumers Because It Limits Service Competition, Restricts Consumer Choice And Discourages Innovation.

Product purchase decisions are affected by factors other than price. In *GTE Sylvania*, 433 U.S. at 55, the Court noted that "[s]ervice and repair are vital for many products, such as automobiles and major household appliances" and that "[t]he availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product." Competition among retailers of a product with regard to service benefits consumers in a manner similar to price competition. In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), which found an agreement among dentists "to withhold from their customers a particular service that they desire" to violate even the rule of reason, the Court emphasized that the antitrust law is as much concerned with activities that restrain service competition as it is with restrictions on price competition.

> [N]o elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. . . . A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods or services . . . such an agreement limiting consumer choice by impeding the "ordinary give and take of the marketplace," . . . cannot be sustained under the Rule of Reason.

Id. at 459.

Because vertical maximum price fixing agreements also have the real potential of impairing service competition, with no "countervailing procompetitive virtue" to justify their existence except in very limited circumstances where they are necessary to prevent abuse of retailer market power, the continuation of the per se rule of illegality against such agreements is economically justified.

As recognized by the Court in both *Albrecht* and *Maricopa*, maximum price fixing agreements have the potential for restricting service competition by fixing prices too low to enable sellers to provide consumers with the level of service for which consumers, or at least some of them, are willing to pay. This may be done intentionally (such as where a group of sellers hope to avoid potentially costly service competition by agreeing on a price ceiling that will not allow more than a certain level of service) or unintentionally (such as where a manufacturer misjudges the level of service which potential users of its products desire and for which they are willing to pay). Whether the interference is intentional or unintentional, it harms consumers by reducing service competition and the choices of price and service combinations available to consumers.

Manufacturers normally impose a minimum level of service on their retailers,[2] but retailers often compete for product sales by offering service above that level. In the motor vehicle industry, service competition may include various items such as expanded service hours, free use of a vehicle while the customer's own vehicle is being serviced, off-site pickup and delivery of vehicles requiring service, emergency road and towing service and parts inventories, special tools and diagnostic equipment and technician training that exceed the manufacturer's requirements. Service competition is not limited to aftermarket service. Service competition also involves the selling process with regard to such factors as the number of demonstrators available for prospective purchasers to test-drive, the number of new vehicles held in inventory for immediate delivery to customers, the hours during which sales offices are open and the training of sales personnel. Retail service competition may also exist with

[2] In the motor vehicle industry, the minimum dealer service requirements that manufacturers impose are by themselves very costly for the dealers. Even without manufacturer-imposed retail price ceilings, the "low prevailing margins for dealers in a highly competitive interbrand market" (AAMA and AIMA Brief, at 15) leave little margin for dealers to invest in their own service innovations. Motor vehicle manufacturers already have a great disparity of bargaining power over their dealers. *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 100-02 (1978). Allowing manufacturers to define both the minimum service requirements and the maximum retail prices for their dealers would permit them to virtually eliminate all intrabrand service competition as well as to force dealers out of the market by denying them sufficient profits to cover the costs of the manufacturer-imposed service requirements.

regard to the dealer-installed accessories offered to consumers.

There is no credible evidence that manufacturers, even when acting independently, are better able to determine the combination of price and service desired by consumers than is established through direct negotiations between the consumers and dealers. Allowing manufacturers to fix maximum retail prices prevents retailers from responding appropriately to market signals that consumers place a value on a particular item of service or combination of services and are willing to pay more than the artificially imposed maximum price for the product with that service item or combination. Recent case, 110 Harv. L. Rev. 523, 526, n.34 (1996) ("[i]ndependent pricing in a competitive market improves market efficiency through more rapid communication of changes in value, and is thus an interest worthy of antitrust protection.").

Left to make the determinations for themselves, different retailers will reach different decisions regarding service levels desired by users of a product thus giving users several alternative combinations of service and price from which to select. Maximum price fixing interferes with the creation of these alternatives. Whether imposed by horizontal or vertical agreement, maximum price fixing forces each retailer who is a party to the agreement to provide no more than the level of service that the maximum price limit will allow.

The *per se* rule against vertical maximum price fixing ensures that the market will determine appropriate prices for the combinations of products and services that consumers want instead of the manufacturer setting arti-

ficial price limits that prevent some combinations from even being offered. Except in the unusual situation where a dealer possesses market power, a dealer will not be able to force consumers to accept a particular combination of product and service or to pay a supracompetitive price for the combination desired. If a dealer tries to do so, other dealers, usually both intrabrand and interbrand, will offer the consumer the desired combination at the lower market price.

Quoting Justice Holmes' dissent in *Dr. Miles*, 220 U.S. at 411 (Holmes, J., dissenting), the AAMA and AIAM brief argues that "'the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear.'" (AAMA and AIAM Brief, at 9). This is precisely what the *per se* rule against vertical maximum price fixing does by preventing manufacturers from micro-managing their retailers' businesses in a way that interferes with the retailers' abilities to respond to market forces. As discussed below, there is no procompetitive justification for vertical maximum price fixing agreements that will justify allowing such interference with retailers' responses to market forces.

C. Vertical Maximum Price Fixing Agreements May Reduce Competition By Encouraging Horizontal Collusion.

In *Business Electronics Corp., supra*, the Court observed that "[c]artels are neither easy to form nor easy to maintain. Uncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier." 485 U.S. at 727. An anticompetitive down-

side of vertical price agreements generally is that they may facilitate cartels at both the manufacturer or retailer level by making cheating more difficult for members of the cartel. *Id.* at 726.

Vertical maximum price fixing agreements, as well as minimum agreements, may have this facilitating effect. Retailers who want to limit competition among themselves with regard to costly service items may find that the easiest enforcement mechanism for such a cartel is to persuade the manufacturer to impose a maximum retail price ceiling for sales of its products that will not enable any retailer to exceed a certain level of service quality. NADA is concerned with any doctrine that gives manufacturers unnecessary control over their dealers' output and pricing decisions because history has demonstrated that manufacturer control of such decisions tempts dealers to conspire with the manufacturer to exert that control to limit competition at the retail level. *See, e.g., United States v. General Motors Corp.*, 384 U.S. 327 (1966).

D. Vertical Maximum Price Fixing Agreements Have A Greater Potential Of Harming, Than They Do Of Increasing, Interbrand Competition.

In *GTE Sylvania*, the Court refused to extend *per se* illegality to vertical nonprice restraints because such restraints "had real potential to stimulate interbrand competition, 'the primary concern of antitrust law.'" *Business Electronics Corp.*, 485 U.S. at 724. Vertical nonprice restraints can stimulate interbrand competition by "induc[ing] competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown

to the consumer" and "induc[ing] retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of [manufacturers'] products." *GTE Sylvania*, 433 U.S. at 55.

Vertical maximum price fixing agreements do not have this potential for stimulating interbrand competition. Instead, they have the opposite effect. They have the potential of artificially curtailing retailers' abilities to obtain the true market price for their products and services. When this occurs, it limits the retailers' abilities to make the investment of capital and labor, to engage in promotional activities and to provide service and repair facilities that the Court has identified as important components of effective interbrand competition. Therefore, the justification for applying the "rule of reason," instead of the *per se* rule, to nonprice vertical restrictions, does not apply to vertical maximum price fixing agreements. On the contrary, the fact that interbrand competition is "the primary concern of antitrust law" is an important reason for continuing the *per se* rule of illegality for vertical maximum price fixing agreements.

E. Vertical Maximum Price Fixing Agreements Have The Potential For Creating Uniform Prices.

A prime example of how this could occur is illustrated by the AAMA and AIAM *amici curiae* brief supporting the Petitioner. At pages 22 and 23 of that brief, the motor vehicle manufacturers argue that the *per se* prohibition on maximum resale price maintenance hinders brand-wide price advertising. Their complaint is that the present rule requires that "at most a manufacturer can advertise a 'suggested price' that may be available only at 'participating dealers'" and that changing the present rule will allow them to advertise maximum prices with the assurance that no dealer will exceed those prices. They also then argue that doing away with the *per se* rule will allow motor vehicle manufacturers "to implement 'one-price' or 'no haggle' pricing . . ." that will prevent dealers from negotiating prices with customers.

Brand-wide price advertising of maximum prices by manufacturers, in combination with manufacturer imposed "one-price" programs, have the obvious potential of fixing uniform retail prices among intrabrand dealers at the maximum price level. Maximum price advertising will condition the public to accept such prices as the "no-haggle" price when they visit the dealers' showrooms. The potential for uniform intrabrand pricing in an industry presently characterized by intense interbrand and intrabrand price competition, which may result from a change in the current rule, is "at odds with the antitrust laws' traditional concern for consumer welfare and price competition." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993).

F. Vertical Maximum Price Fixing Agreements Are Seldom Justified By The Need To Prevent Retailers From Exploiting Market Power.

The "arguable justification" for vertical maximum price fixing agreements is "that they prevent retailers or wholesalers from reaping monopoly or supercompetitive profits." *Albrecht*, 390 U.S. at 159 (Harlan, J., dissenting). However, the ability of retailers to reap "monopoly or supercompetitive profits" in the absence of vertical maximum price limits exists only in the unusual cases

where they possess market power. The *per se* rule of illegality does not require perfection in its application. "As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a full-blown inquiry might have proved to be reasonable." *Maricopa*, 457 U.S. at 344.

Moreover, in those few cases where retailer market power exists, there are less anticompetitive and more procompetitive means for dealing with abuses of that power than imposing vertical maximum prices. It will be an unusual case indeed where abuse of retailer market power can be curtailed only by a vertical maximum price fixing agreement. If the Court makes any change in the current law regarding vertical maximum price fixing agreements, such change should be limited to allowing an exception to the *per se* rule where the agreement is shown to be essential to curbing abuses of retailer market power, similar to the exception that exists now for horizontal price fixing agreements that are essential to the functioning of a procompetitive activity. *See Broadcast Music*, 441 U.S. at 23.

"Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.' . . . It has been defined as 'the ability of a single seller to raise price and restrict output.' . . . The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992). A retailer cannot reap monopoly or supracompetitive profits unless it possesses market power.

However, "[r]etail market power is rare, because of the usual presence of interbrand competition and other dealers, see *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54, 97 S. Ct. 2549, 2559-60, 53 L.Ed. 2d 568 (1977), and it should therefore not be assumed but rather must be proved." *Business Electronics Corp.*, 485 U.S. at 727, n.2. The Court in *Business Electronics Corp.* observed that, "so long as interbrand competition existed, that would provide a 'significant check' on any attempt to exploit intrabrand market power." *Id.* at 725. In relevant markets where interbrand competition exists, vertical maximum price fixing agreements cannot be justified on the basis that they are necessary to avoid the exploitation of market power by the manufacturers' dealers.

The fact that the AAMA and AIAM brief admits that there is "intense interbrand competition" in the motor vehicle industry makes any argument that vertical maximum price fixing agreements are necessary to avoid customers having to pay above-market prices in that industry ring hollow. Moreover, the expansion of market boundaries through new technology developments such as Internet marketing and selling makes the potential for retailers possessing market power even less today than it was when *Albrecht* was decided. *Cf.*, Jonathan B. Baker, *Identifying Horizontal Price Fixing In The Electronic Marketplace*, 65 Antitrust L.J. 41 (1996) ("[m]arketing and direct sales on the Internet may be the wave of the commercial future.").

If a retailer does have market power, it most often will be because the manufacturer itself possesses such power and has transferred such power to the retailer through vertical nonprice restrictions on intrabrand competition. A manufacturer legitimately concerned with the abuse of

retailer market power that it has created through vertical nonprice restrictions has the means to deal with that abuse other than by imposing maximum retail price limits. It may instead remove the restrictions on intrabrand competition which gave the retailer market power in the first instance. Such restrictions may in fact be illegal under the rule of reason pursuant to *GTE Sylvania*, by virtue of their having facilitated the abuse of market power.

Increasing intrabrand competition will almost always be a more procompetitive way of dealing with retail market power than creating an artificial retail price ceiling. All that a vertical maximum price fixing agreement does is prevent the retailer with market power from charging above the fixed maximum price. The retailer still retains market power and, therefore, has no incentive to price below the fixed price, even if it is above what the price would be in a competitive market. Mark E. Roszkowski, *Vertical Maximum Price Fixing: In Defense of Albrecht*, 23 Loy. U. Chi. L.J. 209, 225 (1992). Increasing intrabrand competition in markets where interbrand competition is not sufficient to prevent the exploitation of market power eliminates retailer market power and ensures that consumers will pay only competitive prices.

Manufacturers, therefore, seldom have a true procompetitive justification for imposing vertical maximum price agreements on their dealers. Their reasons for doing so are either competitively neutral or anticompetitive. Where the market is competitive, as usually will be the case, dealers are presumed to price the packages of goods and services that they offer at market prices. A manufacturer's attempt to force its dealers to charge below mar-

ket prices in an effort to maximize the manufacturer's own short-term sales and profits, at the potential expense of weakening service and interbrand competition by those dealers in the long term, is not a procompetitive justification for vertical maximum price agreements. It is axiomatic that the antitrust law is enacted to protect competition, not individual competitors. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986). The *per se* rule against vertical maximum price fixing agreements protects competition with regard to both service and price and should be retained.

CONCLUSION

Based on the foregoing reasons and authorities, NADA respectfully asks that the Court not overturn the *per se* rule of illegality against vertical maximum price fixing agreements.

Respectfully submitted,

WILLIAM A. NEWMAN
JAMES A. MOORS
WM. BRETT RICHARDSON
National Automobile
Dealers Association
8400 Westpark Drive
McLean, VA 22102
(703) 821-7041

PAUL R. NORMAN
(Counsel of Record)
JAMES E. BARTZEN
JENNIFER S. MIRUS
Boardman, Suhr, Curry
& Field
410 Firstar Plaza
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701-0927
(608) 257-9521

Attorneys for Amicus Curiae